BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRUCE WALKER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 196,172 & 196,173
GENERAL MOTORS CORPORATION	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler dated March 31, 1997. The Appeals Board heard oral argument September 16, 1997.

APPEARANCES

Claimant appeared by and through his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jeffrey M. Pfaff of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by and through its attorney, David J. Berkowitz of Lawrence, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record described in the Award. The Appeals Board has also adopted the stipulations in the Award.

ISSUES

In an Award dated April 29, 1996, the Administrative Law Judge found claimant's asthma to be an ordinary disease of life and, therefore, not compensable. The Appeals Board reversed the decision of the Administrative Law Judge and, in an Order entered in January 1997, remanded the claim for additional findings, including the findings as to the nature and extent of disability. On remand, the Administrative Law Judge awarded benefits for a 40 percent permanent partial general body disability in Docket No. 196,172 for injuries sustained on May 17, 1993, and found that there was no additional disability sustained in November 1994, and, therefore, ordered no benefits under Docket No. 196,173.

On appeal, the issues are as follows:

(1) The date of accident.

(2) The nature and extent of claimant's disability

(3) Whether the Kansas Workers Compensation Fund (Fund) is liable for any or all of the benefits awarded.

(4) Whether respondent is entitled to credit for disability payments under separate disability insurance plan.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

(1) December 1, 1994, should be treated as the date from which compensation is computed.

Claimant began working for respondent, General Motors, as a pipefitter in May 1985. In 1986, he was diagnosed as having asthma and was referred to a pulmonologist, Ann M. Romaker, M.D. He has been under her care since. He was on sick leave for his asthma from May 1992 until August 1992, and on sick leave again from May 1993 until November 1994.

Claimant originally brought two separate claims. One alleged a date of accident from 1991 through June 30, 1993, and a second alleged an accident from July 1, 1993 through December 1, 1994.

In its January 1997 Order, the Appeals Board found claimant's asthma to be a compensable occupational disease. K.S.A. 44-5a06 governs the date of accident for occupational disease and states as follows:

> The date when an employee or workman becomes incapacitated by an occupational disease from performing his work in the last occupation in which

> he was injuriously exposed to the hazards of such disease, shall be taken as the date of the injury equivalent to the date of accident under the workmen's compensation act.

In this case, claimant returned to work for respondent in November 1994, and suffered from exposures during the next approximately one month. The exposures at work during that return required a one-week hospitalization. The Appeals Board finds December 1, 1994, to be the last injurious exposure and will treat that date as the date of accident.

(2) The Appeals Board finds claimant is entitled to benefits for a 25 percent general disability.

The first issue is the standard or test to be applied to determine the nature and extent of disability in an occupational disease case. As the parties indicate, the Kansas Supreme Court addressed this question in Knight v. Hudiburg-Smith Chevrolet, Olds., Inc., 200 Kan. 205, 435 P.2d 3 (1967), and Schubert v. Peerless Products, Inc., 223 Kan. 288, 573 P.2d 1009 (1978). In Knight v. Hudiburg-Smith, the Supreme Court reviewed the then applicable standards for determining the nature and extent of disability for an accidental injury. At that time the standards were based upon the inability to earn wages in employment of the same type and character as the employment at the time of the injury. The Supreme Court noted provisions in the Act relating to occupational disease, specifically K.S.A. 44-5a04, which authorized the Director to cancel an award for occupational disease in cases where the claimant returned to work at the same wage in any employment. On the basis of those provisions, the Court concluded that the occupational disease must be based upon the claimant's ability to earn wages in work of any type. The Court, therefore, adopted a measure of disability for occupational diseases different than the then applicable measure for disability in cases involving accidental injury.

The Appeals Board considered disability from occupational disease in the case of James C. Strome v. N.R. Hamm Quarry, Docket No. 162,253 (March 1997). In that case, the date used for computing benefits was in February 1992 and at that time disability by accidental injury was measured by its effect upon the claimant's ability to earn a comparable wage and ability to obtain and retain employment in the open labor market. K.S.A. 1991 Supp. 44-510e. Because the measure of disability for accidental injury was no longer based upon claimant's ability to perform the work he or she was performing at the time of the injury, the Appeals Board concluded the reasons for applying a different standard in cases of occupational disease, as stated in Knight and Schubert, no longer existed. The Appeals Board, therefore, looked to the general provisions of K.S.A. 44-5a01 which stated:

> . . . the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance

> with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases. (Emphasis added.)

Finding that the Act no longer specifically provides a different measure for disability in cases of occupational disease, the Appeals Board applied the measures used for accidental injury.

The current case differs from the James C. Strome decision in that the date of disablement in this case was after July 1, 1993, the date when a measure for determining disability by accident was again changed. For accidents after July 1, 1993, the work disability is measured by loss of ability to perform tasks in previous employment and the difference in wage pre- and post-injury. The Appeals Board has, nevertheless, concluded that, even with the changes made in 1993, the extent of disability from occupational disease should be measured the same as for accidental injuries. The measure of disability for accidental injury remains, in part, dependent upon the ability to obtain employment in the open labor market. This factor influences the wage aspect of the measure of disability. In addition, the wage prong depends not only on the actual difference in wage, but, if the employee does not act in good faith in seeking employment, may be based upon the claimant's ability to earn a wage in any employment. Copeland v. Johnson Group, Inc. and Travelers Insurance Company, 24 Kan. App. 2d 306, ___ P.2d ___ (1997). Finally, the key factor noted in the Knight decision was the Director's ability to cancel an award for occupational disease when the claimant returned to work at a comparable wage. The current test for disability by accident reduces the award to functional impairment only if the claimant returned to work at a comparable wage. In addition, K.S.A. 44-528 contains the following provisions, applicable to accidental injury, which may come into play when a claimant returns to work at a comparable wage at any employment:

> If the administrative law judge finds that the employee has returned to work for the same employer . . . or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, . . . the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation. (Emphasis added.)

As noted in the Strome decision, K.S.A. 44-5a01 states the disability by occupational disease is to be treated the same as disability by accident "except as specifically provided otherwise for occupational disease." The Appeals Board finds that the provisions relating to occupational disease do not specifically provide another measure for determining disability. Accordingly, the Appeals Board finds that disability should be measured, in cases of occupational disease, the same as it is for accidental injury.

For accidents and injuries after July 1, 1993, disability is to be measured as specified in K.S.A. 44-510e as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In this case, claimant was not, following his hospitalization in 1994, able to return to his employment for the respondent. Instead, he chose to return to school where he was, at the time of the regular hearing, studying to become a teacher. The evidence also establishes, however, that claimant retained the ability to gain employment in the open labor market, even if not comparable wage. Because he has "returned to school," claimant has not made an effort to obtain other employment. As authorized in Copeland v. Johnson Group, Inc. And Travelers Insurance Company, *supra*, the wage prong may, therefore, be based upon what claimant is able to earn.

In this case, two vocational experts gave testimony regarding claimant's ability to earn wages, Mr. George R. McClellan and Mr. Michael J. Dreiling. Mr. McClellan opined the claimant retained the ability to earn between 70 and 95 percent of his pre-injury wage for 5 to 30 percent loss. Although he expressed those percentages, he also opined that claimant's probable pay levels would vary from an entry-level job at $10 per hour to a sales job that might earn as much as $35,000 per year. For a 40-hour week, $10 per hour would be closer to a 50 percent loss as compared to claimant's stipulated pre-injury wage of $802.40. The $35,000 per year would represent an approximate 16 percent loss. Mr. Michael J. Dreiling also testified as to claimant's loss of ability to earn wages. Mr. Dreiling opined that claimant has a loss of 65 percent of his ability to earn wages. Combining the two wage-loss opinions and giving approximately equal weight to each (using adjusted percentages for Mr. McClellan's opinion), the Appeals Board finds claimant sustained a 50 percent loss of ability to earn comparable wages.

The wage loss must be averaged together with the loss of ability to perform the tasks claimant performed in the 15 years of work prior to the injury. *See* K.S.A. 44-510e. Both Mr. McClelland and Mr. Dreiling testified regarding claimant's loss of ability to perform tasks. However, the record contains no opinion of a physician on this question of tasks. K.S.A. 44-510e requires the opinion of a physician regarding the loss of ability to perform tasks. Accordingly, the Appeals Board finds claimant has failed to sustain his burden of proving the task loss and, therefore, a 0 percent task loss must be used as part of this formula. Averaging the task loss and wage loss together, the Appeals Board finds claimant sustained 25 percent work disability.

K.S.A. 44-510e provides that, in any case, the claimant's loss of ability shall not be less than functional impairment. The record, in this case, includes two functional impairment

ratings, one by Gerald R. Kerby, M.D., and the other by Harold W. Barkman, Jr., M.D. Dr. Barkman states that, in his opinion, the claimant has a 10 to 20 percent functional impairment according to the AMA Guides, Fourth Edition. Dr. Kerby states the claimant has a 20 to 40 percent functional impairment based upon guidelines of the American Thoracic Society. The evidence, therefore, suggests the possibility that the functional impairment is higher than the work disability.

However, K.S.A. 44-510e(a) provides that functional impairment must be based on the Third Edition (Revised) of the AMA Guides if the impairment is contained therein. Neither physician gave an opinion based on the Third Edition of the AMA Guides. Dr. Barkman testified he used the Fourth Edition of the AMA Guides because the Third Edition is out of print. Dr. Kerby testified he uses the guidelines from the American Thoracic Society because the AMA Guides do not have a good scheme for measuring disability for asthma, except for severe asthma. The Appeals Board finds claimant has not met his burden to show the extent of the functional impairment. Claimant has not shown the extent of disability according to AMA Guides, Third Edition (Revised), and has not established that the condition is not covered by the AMA Guides, Third Edition (Revised). As a result, the work disability controls the award of permanent partial disability in this case.

(3) The Kansas Workers Compensation Fund is not liable for any portion of the award.

By amendments enacted in 1993, the Kansas Legislature eliminated liability to the Kansas Workers Compensation Fund for re-injury to a handicapped employee which previously existed under K.S.A. 44-567. The Appeals Board has found the date of accident in this case to be after July 1, 1994, and accordingly the Kansas Workers Compensation Fund does not have liability.

(4) The respondent is not entitled to credit for benefits paid under a separate disability policy.

The Appeals Board finds no authority in the Workers Compensation Act which would authorize the respondent to take credit for disability benefits made under a separate private disability insurance policy. That separate policy is presumably the subject of a separate contract which entitled the individual to benefits under the circumstances specified in that agreement. Whether it is a benefit in addition to workers compensation benefits or only applicable to injuries not covered by workers compensation benefits or otherwise is not known. Regardless, respondent has an obligation to pay benefits specified under the Kansas Workers Compensation Act.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 31, 1997, entered by Administrative Law Judge Robert H. Foerschler, should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bruce Walker, and against the respondent, General Motors Corporation, a qualified self-insured, for an accidental injury which occurred December 1, 1994, and based upon an average weekly wage of $802.40 for 75.29 weeks of temporary total disability compensation at the rate of $319 per week or $24,017.51 and 88.68 weeks at the rate of $319 per week or $28,288.92, for a 25% permanent partial general disability, making a total award of $52,306.43.

As of October 31, 1997, there is due and owing claimant 75.29 weeks of temporary total disability compensation at the rate of $319 per week or $24,017.51, followed by 76.85 weeks of permanent partial compensation at the rate of $319 per week in the sum of $24,515.15 for a total of $48,532.66, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $3,773.77 is to be paid for 11.83 weeks at the rate of $319 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Jeffrey M. Pffaff, Kansas City, MO
David J. Berkowitz, Lawrence, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director